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Nos. 94-1361, 94-1477

In The

Supreme Court of the United States

October Term, 1994

MARJORIE ZICHERMAN, individually and as executrix of the estate of Muriel A.M.S. Kole, and Muriel Mahalik,

Petitioner,

v.

KOREAN AIR LINES CO., LTD.,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE AND BRIEF AMICI CURIAE OF PHILOMENA DOOLEY, ET AL. IN SUPPORT OF PETITIONER ZICHERMAN

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INTRODUCTION

Philomena Dooley, as Personal Representative of the Estate of Cecilio Chuapoco, deceased, and others identified in the Appendix to the Motion, hereby respectfully move for Leave to File a Brief Amici Curiae in this case in support of Petitioner, Marjorie Zicherman, as provided in Rule 37 of the Rules of this Court. The consent of the attorneys for the Petitioners has been obtained. The consent of the attorneys for the Respondent Korean Air Lines Co., Ltd. (hereinafter "KAL") was requested. Although consent was refused, Respondent does not object to this Motion for Leave to File Brief Amici Curiae.

After the air disaster of September 1, 1983 in which a KAL Boeing 747 was destroyed, the catastrophe giving rise to the underlying *Zicherman* action, numerous claims were filed in the United States district courts across the country. All federal court actions were transferred by the Judicial Panel on Multi-District Litigation (J.P.M.L.) to the United States District Court for the District of Columbia, per Judge Aubrey E. Robinson, Jr., for coordinated and consolidated pretrial proceedings on the common liability issues. *See In re Korean Air Lines Disaster of September 1, 1983*, 575 F.Supp. 342 (J.P.M.L. 1983). On August 2, 1989, a jury returned a verdict that the shootdown of KAL Flight KE 007 by Soviet military aircraft and the deaths of all on board were proximately caused by the "wilful misconduct"[1]

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[1] The claims against KAL were unquestionably governed by the Warsaw Convention, formally known as the Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, 49 Stat. 3000, T.S. 876 (1934), *reprinted* in note following 49 U.S.C. App. §1502. Pursuant to the provisions of the Warsaw Convention, the

of the KAL flight crew.[2] KAL appealed; the Court of Appeals for the District of Columbia Circuit affirmed the finding of wilful misconduct. *In re Korean Air Lines Disaster of September 1, 1983*, 932 F.2d 1475 (D.C. Cir.), *cert. denied*, 502 U.S. 920, 616 (1991).

After liability was confirmed, United States District Judge Aubrey E. Robinson, Jr. remanded all actions that had not been originally filed in that court to the originating district courts. Several district courts issued orders relating to the right to a jury trial, to measures of damages, and to applicable beneficiaries in Warsaw Convention actions. *See, e.g., In re Korean Air Lines Disaster*, 798 F.Supp. 755 (E.D.N.Y. 1992); *In re Korean Air Lines Disaster*, 807 F.Supp. 1073 (S.D.N.Y. 1992); *In re Korean Air Lines Disaster*, 814 F.Supp. 592 (E.D. Mich. 1993); *In re Korean Air Lines Disaster*, 814 F.Supp. 599 (S.D.N.Y. 1993); *Park v. Korean Air Lines*, 1992 WL 331092 ___ F.Supp. ___ (S.D.N.Y. 1992); *Hollie v. Korean Air Lines Disaster*, 834 F. Supp. 65 (S.D.N.Y. 1993); *In re Korean Air Lines Disaster of September 1, 1983*, M.D.L. 565, CV-83-2793 *et al*, Memorandum Opinion and Order, April 8, 1993 (D.D.C. 1993); *Saavedra v. Korean Air Lines Co., Ltd.*, No. C-84-9324 *et al.*, Memorandum Opinion and Order, Oct. 19, 1992 (C.D. Cal. 1992); *Bayona v. Korean Air Lines Co., Ltd.*, No. 85-3819, Memorandum Opinion and Order, Feb. 1, 1993 (D.N.J. 1993).

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carrier's liability is limited to a monetary cap unless the conduct causing the injury was "wilful misconduct". The verdict by the jury operated to remove the monetary limit on damages.

[2] The jury also returned a verdict for punitive damages which was reversed on appeal. *In re Korean Air Lines Disaster of September 1, 1983*, 932 F.2d 1475 (D.C. Cir.), *cert. denied*, 502 U.S. 994 (1991).

Trials on damages were held and verdicts entered in the United States District Court for the Southern District of New York (including *Zicherman v. Korean Air Lines Co., Ltd.*), in the Eastern District of Michigan, in the Central District of California, in the Northern District of California, and in the District of Columbia.

Then on December 13, 1993, Korean Air Lines filed a Motion to Vacate and Set Aside the Final Judgment on the Issue of Liability and Grant a New Trial Pursuant to Rule 60(b) of the Federal Rules of Civil Procedure. In response to that Motion, District Judge Aubrey E. Robinson, Jr. requested the J.P.M.L. by letter dated February 4, 1994 to re-transfer all damages cases pending in the other district courts to his court for centralized disposition of KAL's Rule 60(b) Motion. The J.P.M.L. ordered the transfer or re-transfer of all KAL damage claims pending in other district courts to the District of Columbia on April 12, 1994. As of that date, however, several cases had been tried to verdict (including the *Zicherman* action) and were pending in the United States Courts of Appeals for the Second, Ninth, Sixth, and District of Columbia Circuits. Accordingly, those cases were not affected by the J.P.M.L.'s Order since the Panel's jurisdiction only extends to United States District Courts. 28 U.S.C. §1407. Those appeals are proceeding according to individual schedules and are still pending in the Courts of Appeals identified in the Appendix.

After the J.P.M.L. re-transferred all actions to the District Court for the District of Columbia, District Judge Aubrey E. Robinson, Jr., stayed all further proceedings until the Rule 60(b) Motion was decided. On July 1, 1994, Judge Aubrey E. Robinson, Jr., denied KAL's Rule 60(b) Motion. *In re Korean Air Lines Disaster*, 156 F.R.D. 18

(D.D.C. 1994). KAL appealed the denial of the Motion to the United States Court of Appeals for the District of Columbia Circuit. By Order dated April 6, 1995, the Circuit Court unanimously affirmed District Judge Aubrey E. Robinson's denial of KAL's Motion. *In re Korean Air Lines Disaster*, ___ F.3d ___, 1995 U.S. App. Lexis 8840 (D.C. Cir. 1995) (per curiam).

All of the district court cases that had been re-transferred to the District of Columbia, as well as those that had originally been filed in that court, are currently pending before District Judge Aubrey E. Robinson, Jr., as set forth with more particularity in the Appendix to the Motion.

This Motion for Leave to File a Brief Amici Curiae is filed on behalf of all plaintiffs in the District Court and Courts of Appeals (other than *Zicherman*) whose actions arise as a result of the deaths of passengers on board Korean Air Lines Flight 7 (KE 007) on September 1, 1983, which deaths resulted from the wilful misconduct of agents, servants and employees of Respondent KAL during international air transportation which implicates the provisions of the Warsaw Convention.

ARGUMENT

In the Writs for *Certiorari* pending before the Supreme Court, this Court will decide whether loss of society damages are available in a cause of action arising from the Warsaw Convention as "damage sustained". The particular case in which *Certiorari* was granted, *Zicherman v. Korean Air Lines*, involves the sister and mother of a deceased passenger. In *Zicherman*, the Second Circuit held that only dependents may recover damages for loss of a decedent's society. *Zicherman v. Korean Air Lines*, 43 F.3d

18, 22 (2d Cir. 1994), *cert. granted*, 63 U.S.L.W. 3745 (U.S. Apr. 18, 1995) (Nos. 94-1361, 94-1477).

This Court's decision on whether loss of society damages are "damage sustained" within the meaning of the Warsaw Convention will have far-reaching effects on all of the KE 007 cases currently pending in the courts below. The cases below encompass a wide variety of family settings. The familial relationships of the claimants to the decedents vary widely, presenting a wide spectrum of family circumstances. The Court's decision on the issues addressed in the Writs for *Certiorari* are critically important to the plaintiffs below whose beloved family members have been killed as a result of the egregious misconduct of the Respondent KAL. Thus, this Court's decision has direct implications for the lives of scores of families beyond the family in the *Zicherman* action.

Petitioner Zicherman will necessarily concentrate on the peculiar facts of that case. The proposed *Amici* tender a brief that will treat the issues more generically. We believe that our contribution should assist the court in setting the issues presented in a broader context, thus ensuring a wider grasp of the grave importance of this decision for all passengers who travel in international flight to which the Warsaw Convention is applicable and, particularly, to the Amici herein.

Dated: May 31, 1995

Respectfully submitted,

SPEISER, KRAUSE, MADOLE & COOK

By _____

Juanita M. Madole

APPENDIX

I. Plaintiffs whose cases are currently pending in the United States District Court for the District of Columbia are as follows:

	Case No.	Plaintiff	Decedent
1.	83-2793	Philomena Dooley	Cecelio Chuapoco
2.	83-2940	Kimberly Saavedra	Jan Hjalmarsson
3.	83-3177	Anne K. Fletcher and Anne Hutchinson Powrie	Ian Powrie
4.	83-3289	Mayuree Siripoon	Jintana Siripoon
5.	83-3793	Parvaneh Zareh	Darioush Zareh
6.	83-3890	In Jig Lin	San Mei Lin
7.	84-0331	Robert Boyar	Jan Moline
8.	84-0332	Robert Boyar	Michael Truppin
9.	84-0542	Sung Sheen Uhm	Ok Soon Chung
10.	84-1707	Shirley Katz	Jack Katz
11.	84-1710	Carl M. Cole	Kwang Woon Siow
12.	84-2858	Allan J. Levenson	Sung Boo Yoon
13.	85-2788	Indep Ing.	Property Loss
14.	85-3444	Robert Boyar	Park
15.	84-9334	Kimberly Saavedra	Tomiko Kohno
16.	85-9330	Kimberly Saavedra	Hiroaki Kawana
17.	85-5327	Kimberly Saavedra	C. Kim
18.	85-5329A	Kimberly Saavedra	J. Lee, W. Lee, H. Jung
19.	85-5329B	Kimberly Saavedra	H. Kim

20.	85-5329C	Kimberly Saavedra	L. Kim
21.	85-4869	Kimberly Saavedra	Sayuri Mano
22.	85-5329D	Kimberly Saavedra	H.S. Park
23.	85-5490	Kimberly Saavedra	Lee
24.	83-4624	Maria Beirn	James Beirn
25.	83-4626	Robert Speir	Kathy Brown Speir
26.	83-3890	Hans Ephraimson-Abt	Alice Ephraimson-Abt
27.	84-1521	Chong Cha Kim	Jin Hong Kim
28.	84-1707S	Joann C. Dunn	Susan Campbell
29.	85-5757	Leonore D. Lebow	Diane Ariyadej and Sammy Ariyadej
30.	84-5248	Diana Chao	Su-Jen Chan
31.	84-5247	Diana Chao	Yee Shine Chan
32.	84-0691	Tzen Chang	Mason Chang
33.	84-1117	Andi Donovan	Tsai Chen Chang
34.	84-0693	Chi-Chin Lin	Ju-Yen Cheng
35.	83-8765	R. Caltabellatta	Celita Chuapoco
36.	83-7717	R. Caltabellatta	Mary Chuapoco
37.	84-4083	Adhuk Homlaor	Tommy Homloar & Amporn Hansuwan-pisit
38.	84-0670	Chan May Kung	Chin Fan Kung
39.	84-7901	Hee Sook Lee	Eun Hyung Lee
40.	84-0688	Liu Tseui Yu Lee	Li-Cheng Lee
41.	84-0669	Shen Yon Liu	Yun Hsin Chung
42.	84-0675	Shen Yon Liu	Chao Po Liu

43.	84-0681	Shen Yon Liu	Hsuan Yun Hsin Chung
44.	83-6977 83-7903	Eun Jung Oh	Anna Song
45.	84-0788	Lih-Hwa Yu Chen	C. Tien
46.	84-0677	Wang-Huey Ping Yeh	Cheng-Liu Yeh
47.	83-7231	David Wu Dunn	Sirena Wu Dunn

II. The following cases arising out of the subject air disaster are currently pending in the indicated United States Courts of Appeals:

1. *Bickel, et al. v. Korean Air Lines Co., Ltd.*, (Edna Doris Miller, Joyce Chambers, Eleanor Bissell, Hazel James, and Margaret Zarif, deceaseds) Nos. 93-2144, 93-2206, 93-2259, 93-2341, 93-2549, 94-1096, 94-1098, 94-1100, 94-11021 (6th Cir. docketed Sept. 2, 1993).

2. *Saavedra v. Korean Air Lines Co., Ltd.*, (Masakasu Yamaguchi, deceased) Nos. 94-55018, 94-55060, 94-55161 (9th Cir. docketed Jan. 6, 1994).

3. *Hollie v. Korean Air Lines Co., Ltd.*, (Frances Mae Swift, deceased) No. 94-7208 (2d Cir. docketed Feb. 25, 1994)

4. *Saavedra v. Korean Air Lines Co., Ltd.*, (Makoto Okai and Yoko Okai, deceaseds) Nos. 94-55495, 94-55496 (9th Cir. docketed Apr. 18, 1994).

5. *Ocampo v. Korean Air Lines Co., Ltd.*, (Suellyn Ocampo, deceased) Nos. 94-5323, 94-5424 (D.C. Cir. docketed Oct. 31, 1994).

6. *Oldham v. Korean Air Lines Co., Ltd.*, (John Oldham, deceased) Nos. 94-5321, 94-5338 (D.C. Cir. docketed Nov. 17, 1994).

7. *Maikovich v. Korean Air Lines Co., Ltd.*, (Allen Kohn and Lillian Kohn, deceaseds) No. 94-5371, (D.C. Cir. docketed Dec. 23, 1994).

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BRIEF AMICI CURIAE OF PHILOMENA DOOLEY, ET AL. IN SUPPORT OF PETITIONER ZICHERMAN

QUESTION PRESENTED FOR REVIEW

Since the Warsaw Convention allows recovery for "damage sustained", are damages for loss of society recoverable?

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TREATY PROVISIONS INVOLVED

Amici Curiae are the surviving family members or personal representatives of the estates, or both, of passengers who were killed while engaged in international transportation by air within the meaning of the Warsaw Convention, a multilateral treaty governing the rights and remedies of international air passengers. Convention for the Unification of Certain Rules Relating to International Transportation by Air, October 12, 1929, 49 Stat. 3000, T.S. No. 876 (1934), *reprinted in* note following 49 U.S.C. App. 1502.

Article 17 sets forth the causes of action available under the Treaty as follows:

> The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

Also involved is the provision of the Treaty which establishes that the air carrier cannot avail itself of a limitation on compensatory damages for egregious conduct, Article 25:

> (1) The carrier shall not be entitled to avail himself of the provisions of this Convention which exclude or limit his liability, if the damage is caused by his wilful misconduct or by such default on his part as, in accordance with the law of the Court to which the case is submitted, is considered to be equivalent to wilful misconduct.

(2) Similarly, the carrier shall not be entitled to avail himself of the said provisions, if the damage is caused under the same circumstances by any agent of the carrier acting within the scope of his employment.

STATEMENT OF THE CASE

On September 1, 1983 a Korean Air Lines Co., Ltd. (hereinafter "KAL") Boeing 747 being operated as KE 007 en route from New York's JFK Airport to Seoul, South Korea was shot down by military aircraft of the former Soviet Union while in Soviet airspace approximately 350 miles north of its assigned route of flight. All 269 persons on board the plane perished. Survivors of the victims filed wrongful death actions against KAL in several federal district courts, all of which were transferred to the United States District Court for the District of Columbia (per Judge Aubrey E. Robinson, Jr.) pursuant to 28 U.S.C. §1407. The *Amici Curiae* are the surviving family members or personal representatives[1], or both, of the deceased

[1] The plaintiffs in the actions below are as follows, with the respective decedent passengers identified in parentheses: Philomena Dooley (Cecelio Chuapoco); Anne K. Fletcher, Anne Hutchinson Powrie (Ian Powrie); Mayuree Siripoon (Jintana Siripoon); Parvaneh Zareh (Darioush Zareh); In Jig Lin (San Mei Lin); Robert Boyar (Jan Moline); Robert Boyar (Michael Truppin); Sung Sheen Uhm (Ok Soon Chung); Shirley Katz (Jack Katz); Carl M. Cole (Kwang Woon Siow); Allan J. Levenson (Sung Boo Yoon); Robert Boyar (Park); Kimberly Saavedra (Jan Hjalmarsson, Yooko Okai, Tomiko Kohno, Hiroaki Kawana, Makoto Okai, C. Kim, J. Lee, W. Lee, H. Jung, H. Kim, L. Kim, Sayuri Mano, H.S. Park, Lee); Maria Beirn (James Beirn); Robert

passengers whose damages claims are still pending in the district court and four Circuit Courts of Appeals.

In 1989, a jury trial commenced in the District Court for the District of Columbia to determine whether KAL had committed "wilful misconduct", an affirmative finding of which would preclude KAL from invoking the $75,000 per passenger monetary cap[2] that KAL otherwise

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Speir (Kathy Brown Speir); Hans Ephraimson-Abt (Alice Ephraimson-Abt); Chong Cha Kim (Jin Hong Kim); Joann C. Dunn (Susan Campbell); Leonore D. Lebow (Diane Ariyadej, Sammy Ariyadej); Diana Chao (Su-Jen Chan); Diana Chao (Yee Shine Chan); Tzen Chang (Mason Chang); Andi Donovan (Tsai Chen Chang); Chi-Chin Lin (Ju-Yen Cheng); R. Caltabellatta (Celita Chuapoco); R. Caltabellatta (Mary Chuapoco); Adhuk Homlaor (Tommy Homloar, Amporn Hansuwanpisit); Chan May Kung (Chin Fan Kung); Hee Sook Lee (Eun Hyung Lee); Liu Tseui Yu Lee (Li-Cheng Lee); Shen Yon Liu (Yun Hsin Chung); Shen Yon Liu (Chao Po Liu); Shen Yon Liu (Hsuan Yun Hsin Chung); Eun Jung Oh (Anna Song); Lih-Hwa Yu Chen (C. Tien); Wang-Huey Ping Yeh (Cheng-Liu Yeh); David Wu Dunn (Sirena Wu Dunn); Nan Oldham (John Oldham); Marsha J.K. Maikovich (Allen and Lillian Kohn); Eric Forman (Evelyn Forman); Edward Ocampo (Suellyn Ocampo); Daisy Bickel (Eden Doris Miller); Dorothy Jones (Joyce Chambers); Richard Bowden (Eleanor Bissell); Willie N. James (Hazel James); Michael D. Jones (Margaret Zarif); Barbara Swift Hollie (Francis Mae Swift); Michael Kole (Murial A.M.S. Kole).

[2] Under the Warsaw Convention, the carrier can avail itself of a per passenger monetary limit of approximately $8,300. Because of American dissatisfaction with the low limit, air carriers agreed to (and the Civil Aeronautics Board approved) an increase in the limit to $75,000 per passenger for flights to, from, or with a stopover in the United States. Agreement Relating to Liability Limitations of the Warsaw Convention and The Hague Protocol, Civil Aeronautics Board Agreement 18900, note following 49 U.S.C. App. §1502 (approved by Civil Aeronautics

had available under the Treaty to limits its liability. On August 2, 1989, the jury returned a verdict holding KAL liable for wilful misconduct which was a proximate cause of the passengers' deaths. On appeal, the United States Court of Appeals for the District of Columbia Circuit affirmed the finding of wilful misconduct.[3] *In re Korean Air Lines Disaster of September 1, 1983*, 932 F.2d 1425 (D.C. Cir. 1991), *cert. denied*, 502 U.S. 994 (1991).

After denial of *certiorari*, District Judge Robinson remanded all of the federal cases which had not been filed in his court to the originating district courts for the Southern District of New York, the Eastern District of New York, the District of New Jersey, the Central District of California, the Northern District of California, the Eastern District of Michigan, and the District of Massachusetts for litigation on issues of damages.

Thirteen jury trials and one bench trial were conducted in the United States District Courts for the Eastern District of New York, the Eastern District of Michigan, the District of Columbia, the Central District of California, and the Northern District of California. Appeals were taken from the verdicts and are currently pending in the United States Courts of Appeals for the District of

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Board Order E-23680 May 13, 1966, 31 Fed. Reg. 7302). *See generally*, Lowenfeld & Mendelsohn, *The United States and the Warsaw Convention*, 80 Harv. L. Rev. 497 (1967).

[3] The jury had also awarded punitive damages; that verdict was reversed on appeal. *In re Korean Air Lines Disaster of September 1, 1983*, 932 F.2d 1475 (D.C. Cir. 1991), *cert. denied*, 502 U.S. 994 (1991).

Columbia Circuit, the Sixth Circuit, the Ninth Circuit, and the Second Circuit.[4]

An appeal was taken in *Zicherman v. Korean Air Lines*, which had been tried in the Southern District of New York, to the United States Court of Appeals for the Second Circuit. On November 3, 1994, the Second Circuit affirmed the District Court's verdicts except that it vacated damages for loss of society, holding that such damages are not recoverable unless the surviving relatives were financially dependent on the decedent. The *Zicherman* court also denied a right to recover for mental injury suffered by the survivors. On December 5, 1994, the Second Circuit withdrew its initial opinion and filed an amended opinion holding that the jury's awards for loss of support and loss of inheritance were also subject to a financial dependency requirement. *Zicherman v. Korean Air Lines Co., Ltd.*, 43 F.3d 18 (2d Cir. 1994). Petitions for Writs of *Certiorari* were filed with this Court by both Zicherman and KAL. On April 18, 1995, this Court granted both Petitions for Writs of *Certiorari*. 63 U.S.L.W. 3745 (U.S. Apr. 18, 1995) (Nos. 94-1361, 94-1477).

In addition to the claims currently pending in the Courts of Appeals, there are 46 wrongful death actions currently awaiting damages disposition in the United States District Court for the District of Columbia.[5]

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[4] *See* Appendix to Motion for Leave to File Brief Amici Curiae.

[5] All actions were returned to the United States District Court for the District of Columbia following a Motion pursuant to Rule 60(b) of the Federal Rules of Civil Procedure filed in that Court by KAL to set aside the liability judgment and for a new trial on liability. At the request of Judge Robinson, the Judicial

SUMMARY OF THE ARGUMENT

Article 17 of the Warsaw Convention establishes an independent cause of action for wrongful death and personal injuries sustained during international transportation by air, whether on board the aircraft, or in the course of embarking or disembarking. *See* Article 17, Appx. A-1.[6] The liability of the carrier for such deaths and injuries is for "damage sustained". The ordinary usage of the words of the Treaty and the shared expectations of the Treaty's drafters confirm that "damage sustained" includes damages for loss of a decedent's care, comfort and society. The Treaty imposes no requirement that damages for loss of society, which are essentially damages for the destruction of a close family relationship, be conditioned upon financial dependency.

The Warsaw Convention was conceived by its drafters to achieve several goals. One goal was to enable

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Panel for Multi-District Litigation re-transferred all of the actions from other district courts to the District of Columbia for a consolidated decision on KAL's Rule 60(b) motion. Judge Robinson denied the motion. *In re Korean Air Lines Disaster of September 1, 1983*, 156 F.R.D. 18 (D.D.C. 1994). KAL appealed. The Court of Appeals for the District of Columbia Circuit unanimously affirmed Judge Robinson's decision. *In re Korean Air Lines Disaster of September 1, 1983*, ___ F.3d ___, 1995 U.S. App. LEXIS 8840, (D.C. Cir. 1995) (per curiam). A petition for *certiorari* has not been filed. The other actions arising from the KE 007 catastrophe currently remain in the United States District Court for the District of Columbia and further proceedings have been stayed by that Court. A list of the wrongful death actions is contained in the Appendix to the Motion for Leave to File a Brief Amici Curiae.

[6] "Appx." followed by a page number refers to the Appendix attached hereto which contains relevant provisions of the Warsaw Convention.

families of passengers who were killed or persons injured in international flights to be compensated for the losses incurred. To implement that goal in an era when it was difficult to establish the causes of airplane accidents, the drafters shifted the burden of proof to the carrier to prove that it had taken "all necessary measures" to prevent the accident. *See*, Article 20(1), Appx. A-1. The *quid pro quo* for the presumption of the carrier liability was the right of the carrier to limit its liability for ordinary negligence to a known monetary amount for each passenger. A second important goal of the Convention, however, was to deter carriers from particularly egregious misconduct which was the equivalent to "wilful misconduct". *See*, Article 25, Appx. A-1-A-2. The method chosen to deter such wilful misconduct was to provide that the carrier committing such outrageous behavior be obliged to pay for all resulting injuries.

"Moral" damages such as for loss of society were well-established in civil law countries when the Treaty was drafted. The drafting history contains no hint that the drafters intended to preclude damages for loss of society or to limit damages to pecuniary losses. Nowhere in the text of the Treaty is the word "pecuniary", or its equivalent, mentioned. Rather, the drafters of the Treaty left to each of the signatory countries the exact delineation of recoverable damages and applicable beneficiaries, as long as the damages assessed were consistent with the goals of the Treaty. Only by permitting a broad range of compensatory damages, including damages for loss of society, can the goal of deterring egregious misconduct be achieved. In delineating the damages available in the cause of action established by the federal Treaty, federal

common law must be consulted to implement inherently federal policies.

In addition to effectuating the goals of the Treaty, acknowledging damages for loss of society is consistent with federal common law policies and its evolution of remedies for tortious conduct. Federal common law is ascertained by reference to its application in analogous areas, to federal statutes that may address like issues and to the policies independently adopted by state legislatures on similar matters. The federal common law must also reflect the policies meant to be achieved by the Treaty's goals. Federal common law provides a recovery for family members' loss of a decedent's society.

ARGUMENT

I. THE WARSAW CONVENTION ITSELF CREATES AN INDEPENDENT AND SUBSTANTIVE CAUSE OF ACTION WITH ITS ATTENDANT RIGHTS AND REMEDIES

Article 17 of The Warsaw Convention creates an independent and substantive cause of action for personal injuries and wrongful deaths which occur in international transportation, which action establishes a right to recover for "damage sustained". *See Eastern Airlines, Inc. v. Floyd*, 499 U.S. 530 (1991) (hereinafter referred to as *"Floyd"*) (holding that Article 17 itself provides the cause of action for personal injuries); *In re Mexico City Air Crash of October 31, 1979*, 708 F.2d 400, 409-16 (9th Cir. 1983) (containing an exhaustive analysis the judicial evolution of the Warsaw cause of action in American courts); *Benjamins v.*

British European Airways, 572 F.2d 913 (2nd Cir. 1978), *cert. denied*, 439 U.S. 1114 (1979); M. Milde, *The Problems of Liabilities in International Carriage by Air* 24 (Caroline Univ. 1963). (The Warsaw Convention lays down a uniform substantive law regime of the liability of the carrier for damage sustained by a passenger if the occurrence which caused the damage took place during the carriage by air.) Since the Warsaw Convention creates an independent cause of action for wrongful death, the breadth of the remedies must be defined by the words and intent of the Treaty itself, the context in which the written words are used, and the expectations of the drafters. *Floyd, supra*, 499 U.S. at 534-35.

Because the only authentic text of the Warsaw Convention is in French, the French text of Article 17 must guide this analysis. *Floyd*, 499 U.S. at 534 (citing *Air France v. Saks*, 470 U.S. 392, 397 (1985)). The text reads as follows:

> *Le transporteur est responsable du dommage survenu* en cas de mort, de blessure ou de toute autre lésion corporelle subie par un voyageur lorsque l'accident qui a causé le dommage s'est produit à bord de l'aéronef ou au cours de toutes opérations d'embarquement et de débarquement. 49 Stat. 3005 (emphasis added).

The American translation of the French text, employed by the Senate when it ratified the Convention in 1934, and previously utilized by this Court, *Floyd, supra*, 499 U.S. at 535, reads:

> *The carrier shall be liable for damage sustained* in the event of death or wounding of a passenger

> or any other bodily injuries suffered by the passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking. 49 Stat. 3018 (emphasis added).

Thus, under Article 17, an air carrier is liable for the wrongful death of a passenger when three conditions are satisfied: (1) There has been an accident in which (2) the passenger was killed as a result of said accident which occurred on board an aircraft or in the course of the operations of embarking or disembarking, from which there was (3) damage sustained. It cannot be denied that the deaths of the passengers on KE 007 occurred while they were passengers on board an aircraft in international flight and that the events causing the deaths were an accident within the meaning of Article 17. *See generally Air France v. Saks, supra.* Thus, Article 17 is the foundation for the cause of action for these wrongful deaths. Its words and their meanings must be explored to define the cause of action. *Floyd, supra,* 499 U.S. at 534-35 (citing *Volkswagenwerk Aktiengesellschaft v. Schlunk,* 486 U.S. 694 (1988)) and (quoting *Sociéti Nationale Industrielle Aerospatiale v. United States District Court,* 482 U.S. 522, 534 (1987)); *Air France v. Saks,* 470 U.S. 392, 397 (1985); *accord Chan v. Korean Air Lines Co., Ltd.,* 490 U.S. 122, 134 (1989); *Maximov v. United States,* 373 U.S. 49, 53-54 (1963). The Court may also look to the history of the Treaty, the negotiations, and the practical construction adopted by the parties. *Floyd, supra,* 499 U.S. at 435 (citing *Air France, supra,* 470 U.S. at 396) (quoting *Choctaw Nation of Indians v. United States,* 318 U.S. 423, 431-432 (1943)); *accord Volkswagenwerk, supra,* 486 U.S. at 700.

A. The Words Of The Text And Their Context

1. "DOMMAGE SURVENU"

The Warsaw Convention was drafted by Continental jurists from both civil law and common law countries. Civil law countries, including France, provided full compensation for all damage sustained ("dommage survenu") as a result of an injury or death as long as they were certain and direct. *In re Korean Air Disaster of September 1, 1983, supra,* 932 F.2d at 1487 (citing G. Miller, *Liability in International Air Transport* 112 (1977) (hereinafter "G. Miller")); R. Mankiewicz, *The Liability Regime of the International Air Carrier* 156 (1981) (hereinafter "R. Mankiewicz"). "Dommage survenu" included "dommage matérial" which provided compensation for pecuniary loss resulting from death or injury. G. Miller, *supra,* at 112. It also included "dommage moral" which provided compensation for non-pecuniary damages such as for pain and suffering of a victim of an accident or the sufferings of the family of the victim in the case of death. G. Miller, *supra,* at 112-113; R. Mankiewicz *supra,* at 156.

Thus, the drafters and signatories of the Treaty intended and expected air disaster victims to be compensated for a broad range of damages. No where in the text are there modifying adjectives such as "pecuniary" or its equivalent. Nothing in the drafting history or in subsequent commentator analysis suggests any intent to preclude damages for loss of society for the very real destruction of a close family relationship.

2. THE ORDINARY MEANING OF "DAMAGE"

The ordinary meaning of the English word "damage" confirms that it is broader than mere pecuniary loss.

The Oxford English Dictionary defines "damage" in the first instance as "loss or detriment caused by hurt or injury affecting estate, condition, or circumstances". IV The Oxford English Dictionary (2d ed., Clarendon Press) (1989).

Webster's New World Dictionary of the English Language (Warner, 1987) defines "damage" as "injury or harm resulting in a loss".

Similarly, the New Collegiate Dictionary (G.C. Merriam Co. 1977) defines "damage" as "loss or harm resulting from an injury to person, property or reputation."

Thus, ordinary usage of "damage" is not confined to pecuniary or financial detriment and permits recovery for injuries such as loss of society.

B. The History Of The Treaty

The Warsaw Convention was concluded on October 12, 1929 during the infancy of international air travel. The Convention established a fault-based system for air carrier liability with the burden placed upon the carrier to show lack of negligence by proving that all necessary measures to avoid the damage had been taken or that it was impossible to take such measures. *See* Article 20(1), Appx. A-1. The *quid pro quo* for the presumption of negligence was a monetary limit of liability per passenger of

approximately $8,300. *See generally* Lowenfeld and Mendelsohn, *The United States and the Warsaw Convention*, 80 Harv. L. Rev. 497 (1967).

The Convention had several concurrent goals. Primary among them was to create a uniform system of liability rules that would cover all the hazards of air travel. *Day v. Trans World Airlines, Inc.*, 528 F.2d 31, 38 (2d Cir. 1975), *cert. denied*, 429 U.S. 890 (1976) (citing Sullivan, *The Codification of Air Carrier Liability By International Convention*, 7 J.Air. L. 1, 20 (1936)); Calkins, *The Cause of Action Under the Warsaw Convention*, 26 J.Air. L. 217 (1959). Liability was not differentiated into recoveries disparate for those hazards occurring over land as opposed to those occurring over water.

Another goal of the Treaty was to provide the victims of injury with a basis for recovery and to compensate for those injuries. *Day, supra*, 528 F.2d at 37-38. Protecting air passengers and providing victims with full compensation remain fundamental aims of the Treaty today. *Id.* ("We conclude, in sum, that the protection of the passenger ranks high among the goals the Warsaw signatories now look to the Convention to serve.").

The Executive Branch of the Government has consistently focused on the compensatory aspects provided to the passenger in its support of the Treaty. In his transmittal of the Convention to the United States Senate, Secretary of State Cordell Hull stated:

> *It is believed that the principle of limitation of liability will not only be beneficial to passengers and shippers as affording a more definite basis of recovery* and as tending to less litigation, but that it

> will also prove to be an aid in the development of international air transportation, as such limitation will afford the carrier a more definite and equitable basis on which to obtain insurance rates, with the probable result that there would eventually be reduction of operating expenses for the carrier and advantages to travelers and shippers in the way of reduced transportation charges.
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> *Senate Comm. on Foreign Relations, Message from the President of the United States Transmitting a Convention for the Unification of Certain Rules,* Sen.Exec.Doc. No. G, 73rd Cong., 2d Sess. 3-4 (1934) (emphasis added).

Subsequent dissatisfaction with the low damage amounts, particularly in the United States, resulted in another convocation of delegates at The Hague, Netherlands in 1955 which concluded with The Hague Protocol.[7] Although never ratified by the Senate, the Executive Branch supported its adoption, largely because it provided greater compensation to victims. A letter from the Civil Aeronautics Board to the Senate Foreign Relations Committee in support of The Hague Protocol reads in pertinent part:

> The major benefits of the [Warsaw] convention to passengers, shippers and carriers arise from

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[7] The Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage By Air Signed at Warsaw on 12 October 1929, Sept. 1955, International Civil Aviation Organization Doc. 7686-LC/140, reprinted in L. Goldhirsch, *The Warsaw Convention Annotated: A Legal Handbook* 265-274 (Martinus Nijhoff, 1988).

> the creation of *a uniform body of substantive aviation liability law, applicable regardless of the place of injury,* domicile of the passenger or shipper, or the nationality of the airline involved. *Not only are the rights of recovery for passengers in the event of personal injury or death both assured and provided for in the convention,* but the convention contains numerous provisions defining the respective rights of the consignor, consignee and carrier of air cargo, the legal effect of the air waybill, and provision for liability of the initial carrier in situations where the goods are shipped by several carriers. *These provisions of substantive law are applicable to all claims wherever and however brought,* and protect the claimant from provisions of foreign law or exemplary clauses in the ticket which tend to relieve the carrier from liability, fix a lower limit of liability from that provided for in the convention, or otherwise infringe upon the rules laid down by the convention.
>
> In the absence of the convention, a claimant could be subject to a maze of conflicting principles of conflicts of laws. The discovery and proof of appropriate law to be applied in cases where accidents occur in foreign jurisdictions presents one of the most difficult problems lawyers must face. The Hague Hearings at 20. (quoted in *Reed v. Wiser*, 555 F.2d 1079, 1091 (2d Cir. 1977)). (emphasis added).

After continued dissatisfaction with the Treaty, the United States denounced it.[8] In suggesting denunciation, Senator Robert Kennedy stated in August, 1965:

> Over two million Americans travel annually on international flights. *Assuring that they and their*

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[8] The United States subsequently withdrew the denunciation. *See generally, Lowenfeld* and *Mendelsohn, supra.*

> *families are adequately protected in case of accident is, consequently, a matter of widespread importance* . . . No one questions the fact that the protection now afforded international travelers is woefully inadequate.
>
> 111 Cong. Rec. 20164 (1965) (cited in *Day v. Trans World Airlines, Inc., supra,* 528 F.2d at 36.) (emphasis added)

Yet another goal of the Treaty was to prevent carriers from taking advantage of the monetary limit if the conduct causing the injury was particularly egregious or the equivalent of wilful misconduct. *See* Article 25, Appx. A-1-A-2. The drafters clearly intended to sanction a carrier for gross negligence or outrageous conduct and to permit the advantage of limited liability only for ordinary negligence. The deterrent purposes of the Treaty can only be achieved by subjecting a carrier guilty of wilful misconduct to a broad range of compensatory damages since punitive damages generally are held not to be an available sanction in Warsaw Convention cases. *See, In re Air Disaster at Lockerbie, Scotland on December 21, 1988,* 928 F.2d 1267 (2d Cir.), *cert. denied,* 502 U.S. 920 (1991); *In re Korean Air Lines Disaster, supra,* 932 F.2d at 1484-1490.

Lastly, another goal of the drafters of the Treaty was to establish a long-lasting document that would be sufficiently adaptable to meet the changing needs of future users of civil aviation.

> The Warsaw delegates knew that, in the years to come, civil aviation would change in ways that they could not have foreseen. They wished to design a system of air law that would be both durable and flexible enough to keep pace with these changes. *Day v. Trans World Airlines, supra,* 528 F.2d at 31.

The flexibility in the area of recoverable damages was achieved by deferring to the signatory nations application of and development of their respective substantive national law. As damages for torts evolved and expanded in common law countries, so too could the recoveries for Warsaw-based injuries be expanded, provided that the compensatory (for the passenger) and deterrent (for the carrier) goals were maintained.

C. The Drafters Intended National Substantive Law To Be Applied

Because the Treaty was intended to operate in a changing environment of civil aviation and because neither the civil law countries nor the common law countries wanted to compromise their philosophical approach to recoverable damages, the drafters referred detailed definitions to the substantive law of the signatory countries.[9]

While "damage sustained" was not defined by the Treaty, the *right* to recover actual damages remains within

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[9] As the Reporter of the Warsaw Convention stated on presenting his report to the conference,

> The question has arisen of whether it should be determined who are the persons who can bring an action in the event of death and what damages are subject to reparation. It has not been possible to find a satisfactory solution to this double problem and the C.I.T.E.J.A. [Comité International Technique d'Experts Juridiques Aeriens] has considered that this question of private international law should be regulated independently of the present convention. Minutes of IInd International Conference for Private Air Law, p.166.

the ambit of the Treaty such that its dual goals of compensation to the injured party and deterrence of wilful misconduct must be maintained. R. Mankiewicz, p.15. Therefore, a broad range of compensatory damages must be recoverable.

It is clear, however, that the drafters did *not* intend applicable law to depend solely on the locality of the accident. The drafters gave the injured passenger or his family a choice of fora in which to bring the action: the place of incorporation of the carrier, the principal place of business of the carrier, the place where the contract of carriage was made, and the place of the destination. *See* Article 28, Appx. p.A-2. They did not select as a proper forum the place the accident occurred as that place was considered to be purely fortuitous. *Mertens v. Flying Tiger Lines, Inc.*, 341 F.2d 851, 855 (2d Cir. 1965), *cert. denied*, 382 U.S. 816 (1965). *Calkins, supra,* at p.231.

The forum court must look to the entire substantive law of the forum country to determine recoverable damages. The drafting history of the Treaty references national substantive law because the vast majority of the delegates were from federally unified countries. *See, e.g.*, D. Goedheus, *National Airlegislations and the Warsaw Convention*, 270 (1937) ("The question of whether the plaintiff has in fact a right of action, and if in the affirmative, the extent of the obligation to be indemnified, will be decided by the Court, using as basis the international private law in force for the court seized of the case"); M. Milde, *supra* at p.59 (references to "national law"); R. Mankiewicz, *supra* at p.160 (references to "applicable national law").

The applicable national law in the United States is federal common law and analogous state law since Congress has not defined the damages available in a Warsaw Convention cause of action. Use of federal common law is appropriate to address policy issues involving federal treaties with international implications. *See Miree v. DeKalb County, Georgia*, 433 U.S. 25 (1977); *Clearfield Trust Co. v. United States*, 318 U.S. 363, 367 (1943) ("In absence of an applicable Act of Congress it is for the federal courts to fashion the governing rule of law according to their own standards" [citations omitted]); *Texas Industries v. Radcliff Materials*, 451 U.S. 630, 641 (1981). Lower courts have used federal common law to interpret Warsaw Convention issues. *See Harris v. Polski Linie Lotniczne*, 820 F.2d 1000, 1003-04 (9th Cir. 1987); *In re Disaster at Lockerbie, Scotland on December 21, 1988, supra*, 928 F.2d at 1274-80; *Zicherman v. Korean Air Lines Co., Ltd., supra*, 43 F.3d at 21; *In re Disaster at Lockerbie, Scotland on December 21, 1988, supra*, 928 F.2d at 1274-80; *Zicherman v. Korean Air Lines Co., Ltd., supra*, 43 F.3d at 21; *In re Disaster at Lockerbie, Scotland on December 21, 1988*, 37 F.3d 804, 828 (2d Cir. 1994) ("Lockerbie II"); *see also, Corporacion Venezolana de Fomeato v. Vintero Sales Corp.*, 629 F.2d 786, 795 (2d Cir. 1980) (approving the use of federal common law in specialized areas where jurisdiction is not based on diversity).

Federal common law principles allow for loss of society damages.

II. FEDERAL COMMON LAW SUPPORTS THE RIGHT TO RECOVER FOR LOSS OF SOCIETY

A. There Is A Federal Common Law Cause Of Action For Wrongful Death Which Permits Loss Of Society Damages

This Court has held that there is a federal common law right to recover for wrongful death in the context of

general maritime law. *Moragne v. States Marines Lines*, 398 U.S. 375 (1970). *Moragne* overruled *The Harrisburg*, 119 U.S. 199 (1886), in which this Court had refused to recognize a common law right of recovery for death. In reviewing the historical development of the denial of a common law right to recover for death, the *Moragne* Court implied that the denial was without genuine legal historical justification. 398 U.S. at 378-388. Although the *Moragne* Court stopped short of rewriting history and declined to decide that there had always existed a common law cause of action for death, it did identify a modern federal common law permitting recovery for wrongful deaths.

The federal common law was identified, in part, by acknowledging legislative innovations as statements of policy. *Id.*, 398 U.S. at 390. The Court observed that, since *The Harrisburg*, every state legislature has promulgated wrongful death statutes. The Court reasoned that the states' unanimous recognition of a wrongful death cause of action demonstrated that public policy favors recovery for wrongful death. *Id.* The *Moragne* Court's analytic procedure in identifying federal common law is instructive in the case *sub judice*. Since one method of defining federal common law is to refer to the policies as evidenced by the states' statutes and judicial decisions, *id.* at 408, they should be consulted to decide whether there is a public policy supporting loss of society damages. A clear majority of states permit recovery for loss of society damages. *See Sea-Land Services, Inc. v. Gaudet*, 414 U.S. 573, 586 (1974) (hereinafter "Gaudet"); Speiser, Krause & Madole, *Recovery for Wrongful Death and Injury* 227-40 (3d Ed., Clark Boardman Callahan 1992). Thus, public policy

favors permitting recovery for loss of decedents' society in a federal common law wrongful death action.[10]

This Court in *Moragne* also considered whether Congress had precluded judicial action in identifying federal common law remedies for death. It noted that Congress' enactments of The Death On The High Seas Act (DOHSA)[11] and The Jones Act[12] were not affirmative indications of an intention to preclude judicial allowance of a federal common law wrongful death action.

Loss of society damages in the case of a death are akin to damages for loss of society suffered by a family member in non-fatal personal injury cases. In *American Export Lines, Inc. v. Alvez*, 446 U.S. 274 (1980), this Court identified the right to recover loss of society damages resulting from non-fatal injuries in a general maritime law context. Again recognizing that federal common law is not stagnant but evolves as public policies change, the Court acknowledged that a clear majority of states (forty-one states and the District of Columbia) permit a spouse to recover for loss of consortium resulting from non-fatal injuries to the other spouse. 446 U.S. at 284, n. 11. As regards injuries suffered by a close family member as a

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[10] In recent proceedings in Congress, bills were introduced to limit certain remedies in products liability cases. Although there had been proposals to limit non-pecuniary damages, neither the bill passed by the House nor the bill passed by the Senate limits recovery of non-pecuniary damages, suggesting that public policy favors the recovery of all actual damages without artificial limitations. *See*, H.R. 956, 104th Cong., 1st Sess. (1995).

[11] 41 Stat. 537, 46 U.S.C. §§761-67 (1988).

[12] 41 Stat. 1007, 46 U.S.C. §688 (1988).

result of harm done to a loved one, there is no rational basis for drawing a distinction between fatal and non-fatal injuries. 446 U.S. at 286 (Powell, J. dissenting).

In the case of non-fatal injuries, the relationship between the injured party and a close family member is adversely affected and negatively disrupted. In the case of a death, the relationship is destroyed and the harm is greater. It would be logically inconsistent to compensate the lesser of the damage but to deny recovery for the greater.

Similarly, even in actions under DOHSA, courts have recognized that loss of parental nurture has a value such that damages for that loss are recoverable. *Nygaard v. Peter Pan Seafoods, Inc.*, 701 F.2d 77, 81 (9th Cir. 1983); *Soloman v. Warren*, 540 F.2d 777, 788 (5th Cir. 1976), *reh. denied*, 545 F.2d 1298, *cert. dismissed sub nom.; Warren v. Serody*, 434 U.S. 801 (1977); *Moore-McCormack Lines, Inc. v. Richardson*, 295 F.2d 583, 593 n. 9a (2d Cir. 1961), *cert. denied*, 368 U.S. 989, *reh. denied*, 370 U.S. 965 (1962). Inherent in the allowance of such damages is the recognition of the value, tangible and intangible, that exists in the parent-child relationship. There is no logical reason to differentiate between the loss to a child of a parent and loss to a parent of a child. Indeed, it cannot be disputed that there is no greater loss than the death of a child to a parent who has not only contributed heredity to a child but who has contributed his or her own morals, culture, aspirations, and beliefs. Acknowledging compensation for the destruction of that relationship with loss of society damages advances societal affirmation of family values.

B. Financial Dependency Is Not A Prerequisite To Recover Loss Of Society Damages Under The Warsaw Convention

The Second Circuit has held that loss of society damages are only available to dependent spouses and children under the Warsaw wrongful death cause of action. *Lockerbie II*, 37 F.3d at 829-30; *Zicherman*, 43 F.3d at 22. The Second Circuit rationalized the dependency requirement by analogizing the Treaty wrongful death action to federal maritime law. This analogy is improper given the goals of the Treaty to simultaneously compensate for injury and to deter a carrier's wilful misconduct, necessitating a broad range of recoverable damages. Nowhere in the text of the treaty do the words "pecuniary" or "dependents", or their equivalents, appear. The goals inherent in the Treaty are different than the purposes for which maritime law evolved. It is the Treaty's unique goals that must be effectuated; they are not with the Second Circuit's approach.

Even in general maritime cases, the distinction between dependent and non-dependent sufferers of loss of society is questionable. *See, e.g., Sutton v. Earles*, 26 F. 3d 903, 917 (9th Cir. 1994) (noting that this Court described *Gaudet* claimants as "survivors", not "dependents", in *Mobile Oil Corp. v. Higgenbotham*, 436 U.S. 618, 622 and n. 15 (1978)).

Moreover, it is contrary to human experience to condition compensation for the sudden loss of a beloved family member to a dependency requirement. Conditioning recovery on dependency is particularly illogical in

cases where the loss was due to the carrier's wilful misconduct, e.g., a deliberate failure to take steps necessary for safety. *See American Airlines v. Ulen*, 186 F.2d 529, 533 (D.C. Cir. 1949). *KLM v. Tuller*, 292 F.2d 775, 778 (D.C. Cir. 1961). If the dependency requirement is upheld, it will deny recovery in most circumstances to, e.g., parents whose children, minor and adult, are killed and to adult children for the loss of a beloved parent with whom they maintain a close relationship. There are innumerable permutations of modern family circumstances in which the destruction of a relationship with a non-dependent family member would be a devastating loss. Yet, under the Second Circuit's approach, an air carrier would not be held accountable even though the death was caused by its deplorable acts. Such a result would be intolerable to the traveling public and to the ends of justice.

III. THE COURT IS NOT CONSTRAINED BY MARITIME DECISIONS AND STATUTES IN THESE WARSAW CONVENTION ACTIONS

In the courts below, Respondent KAL argued that where a death covered by the Warsaw Convention occurs on the high seas, the forum court must apply DOHSA as governing substantive law. KAL's position would unquestionably lead to application of different damages standards depending on whether the accident was land-based or sea-based. The drafters of the Treaty, however, contemplated application of the general substantive national law of the court seized of the case, not domestic fragmentations based solely on the accident locality. While the drafters were willing to tolerate some disparity in recoveries because of historic differences between civil

law and the common law, there is no hint in the Minutes or from commentators that further differentiation by political subdivision or accident locale was anticipated. *See, e.g., Mertens v. Flying Tiger Lines, supra,* 341 F.2d at 855; *Eck v. United Arab Airlines, Inc.*, 360 F.2d 804 (3d Cir. 1966) (for Article 28 venue purposes, the High Contracting Party as a nation-state, not political subdivisions, is considered).

As the Warsaw cause of action was intended to be a uniform remedy for injuries and deaths caused in international air transportation, it would be inconsistent to have the forum courts in this country apply different measures of damages depending on whether the aircraft crashed on land or in the sea.

Nor is this Court's decision in *Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990) applicable to these Warsaw Convention death actions. *Miles* denied loss of society damages to the non-dependent parent for the death of a Jones Act seaman. 498 U.S. at 32-33. In doing so, the Court acknowledged Congress' intent to incorporate the substantive recovery provisions of the Federal Employees Liability Act (FELA)[13], which had long been defined as providing recovery for pecuniary loss only, into The Jones Act. But, unlike The Jones Act, Warsaw was ratified without discussion or debate. It cannot be assumed that Congress intended that recovery would be for pecuniary loss only, because there are no references to "pecuniary", or its equivalent, in the text of the Treaty. Moreover, as

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[13] Federal Employees Liability Act, 46 U.S.C. §§674-77 (1988).

Warsaw was clearly designed to govern deaths that occurred on land as well as on water, it cannot be assumed that Congress intended to reference maritime law as a guide to Warsaw's "damage sustained".

Furthermore, Treaty provisions which create domestic law, as does the Warsaw Convention, supersede pre-existing conflicting legislation. *In re Air Crash in Bali, Indonesia on April 22, 1974*, 684 F.2d 1301, 1307-08 (9th Cir. 1982); *Kapar v. Kuwait Airways Corp.*, 845 F.2d 1100 (D.C. Cir. 1988). Thus, the Treaty's cause of action and its attendant remedies displace the cause of action created by DOHSA or The Jones Act for maritime deaths.

Likewise, the Court is not constrained by general maritime law in defining available damages in the Treaty cause of action. Instead, it must develop standards applicable to both land-based and sea-based deaths that occur in international air transportation by acknowledging the independent cause of action created by the Warsaw Convention and defining the applicable damages as including loss of society unfettered by a dependency requirement. In doing so, it will finally resolve the tortuous history of analysis as to whether the Treaty creates an independent cause of action applicable to all damage sustained in international air transportation. *See, e.g., In re Mexico City Air Crash of October 31, 1979, supra*, 708 F.2d at 409-16. The result can only be achieved by reference to the goals of the Treaty itself, not to any singular body of law, such as maritime law, which has no relationship to the unique purposes of the Treaty.

CONCLUSION

The Warsaw Convention cause of action creates a remedy for wrongful death which unconditionally includes damages for loss of society upon a showing of reasonably reliable evidence of the relationship that was destroyed. Such a finding is consistent with the goals of the Treaty to provide broad recovery for "damage sustained" and to preclude a carrier which has committed deplorable acts from benefiting from its wilful misconduct. Such a finding is also consistent with federal common law which recognizes recovery for loss of society. And such a finding judicially acknowledges the value of familial relationships and the interdependence of family members who provide emotional support for each other. The Second Circuit decision regarding loss of society damages should be reversed to the extent it conditions loss of society damages on financial dependency.

Dated:

Respectfully submitted

SPEISER, KRAUSE, MADOLE & COOK

JUANITA M. MADOLE

APPENDIX

ARTICLE 17

The carrier is liable for damage sustained in the event of death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

ARTICLE 20

(1) The carrier shall not be liable if he proves that he and his agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures.

(2) In the transportation of goods and baggage the carrier shall not be liable if he proves that the damage was occasioned by an error in piloting, in the handling of the aircraft or in navigation and that, in all other respects, he and his agents have taken all necessary measures to avoid damage.

ARTICLE 25

(1) The carrier shall not be entitled to avail himself of the provisions of this Convention which exclude or limit his liability, if the damage is caused by his wilful misconduct or by such default on his part as, in accordance with the law of the Court to which the case is submitted, is considered to be equivalent to wilful misconduct.

(2) Similarly, the carrier shall not be entitled to avail himself to the said provisions if the damage is caused under the same circumstances by any agent of the carrier acting within the scope of his employment.

ARTICLE 28

(1) An action for damages must be brought, at the option of the plaintiff, in the territory of one of the High Contracting Parties, either before the Court of the domicile of the carrier or of his principal place of business, or where he has a place of business through which the contract has been made, or before the Court at the place of destination.

(2) Questions of procedure shall be governed by the law of the Court to which the case is submitted.